

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SUSAN K. KRAUSE)	
Claimant)	
VS)	
)	
FRITO-LAY, INC.)	
Respondent)	Docket Nos. 255,668
)	
and)	
)	
CNA INSURANCE COMPANY)	
Insurance Carriers)	

ORDER

Respondent and its insurance carrier appealed Administrative Law Judge (ALJ) Bryce D. Benedict's June 5, 2002, Award. The Appeals Board (Board) placed this case on its summary calendar on August 26, 2002 for a determination without oral argument.

APPEARANCES

Claimant's attorney, Jeff K. Cooper of Topeka, Kansas, appeared not. John D. Jurcyk of Roeland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. By stipulation of the parties the record also contains the medical records and reports placed into evidence by agreement at the December 20, 2001 settlement hearing and the March 21, 2002 regular hearing. In addition, at the March 21, 2002 regular hearing, respondent requested 30 days to provide the affidavit of the claims adjuster, Kelly Ross, in order to document the amounts paid by the insurance carrier for medical treatment and temporary total disability compensation. That affidavit dated April 26, 2002,

was sent with the submission letter from respondent's counsel dated April 25, 2002 and filed on April 29, 2002. As the ALJ did not set a specific terminal date either at the regular hearing or in his March 22, 2002 letter to counsel, the Affidavit of Kelly Ross will be considered as part of the record.

ISSUES

On December 20, 2001, Special Administrative Law Judge Clyde N. Christey awarded claimant \$65,000 payable in one lump sum in addition to the 63.43 weeks of temporary total disability in the total amount of \$22,173.33 and the medical compensation totaling \$58,037.14 already paid by respondent and its insurance carrier. The parties reserved the following issues for a later determination:

1. Whether the surgery performed by Dr. Smith was causally related to the accident.
2. Whether the surgery of Dr. Smith was reasonably necessary to cure or relieve the Claimant's condition from the effects of the accidental injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and arguments, the Board modifies the Award to find the surgery was causally related to claimant's work-related injuries, but otherwise adopts the findings, conclusions and orders of the ALJ as its own as if specifically set forth herein.

This is a claim for a series of work-related accidents and injuries to claimant's low back through March 23, 2000. The parties stipulated to an accident arising out of and in the course of employment and an accident date of September 1, 1999.

At the December 20, 2001, settlement hearing, claimant's counsel explained:

MR. COOPER: Judge, if I could maybe briefly explain, the surgery and the temporary total has previously been paid for on behalf of my client and that was under a preliminary order at that time. The insurance company believes that perhaps the treatment by Doctor Smith was not reasonable and appropriate. They're reversing (sic) the right to pursue that further, but it has no impact on my client. And, therefore, I have no objection to them leaving that part of the settlement open. It won't - -

JUDGE CHRISTEY: Is that correct, Dana:

MS. ARTH: That's correct. ¹

Attached as an exhibit to the settlement hearing by the agreement of the parties, was an August 16, 2001 rating report by board certified orthopedic surgeon Sergio Delgado, M.D., which provided in part:

For this rating report, you have provided me with a copy of additional records of treatment rendered by Michael Smith, MD, **for work related injuries to her lower back** for which she underwent additional diagnostic studies and eventually a disectomy and lumbar interbody posterolateral fusion at L5-S1 on December 21, 2000. Surgery at that time involved using plates, pedicle screws and interbody fusion using an interbody cage. ² (emphasis added)

Respondent's Exhibit 1 to the March 21, 2002 regular hearing transcript contains a "Workers Compensation Notice of Review Determination" dated May 1, 2001 addressed to Terry A. Tracy, M.D., the medical administrator for the Kansas Division of Workers Compensation. It provides, in part:

This case involves a fifty-two year old female with a year long history of low back pain, possibly work related, who apparently failed non-operative treatment. She then underwent surgery.

This is a somewhat complicated case and it is possible for there to be disagreement over how the treatment proceeded. However, one would believe that **the patient's back complaints are most likely work related, or at least aggravated by her work activities**. The non-operative treatment, included epidural injections and the testing, was appropriately done. Surgery would not have been recommended for the following reasons:

- 1.) There was no correlation between her complaints, her physical findings, or the tests. (The EMG was inconclusive, CT and MRI showed no herniation, discogram did not reproduce her symptoms, and the plain x-rays did not show instability.)
- 2.) Dr. Smith did not sound very confident that surgical treatment would be all that helpful. (emphasis added)

¹ S.H.Trans. at 6-7.

² S. H. Trans. Exhibit.

Based upon claimant's testimony at the July 26, 2000 preliminary hearing, the above referenced opinion of Dr. Delgado, and opinions expressed in the May 1, 2001 report of the peer review committee of The Kansas Foundation for Medical Care, Inc., the Board finds the surgery performed by Dr. Smith was for claimant's work-related injuries. The reasonableness of that surgery is a question reserved for determination by the procedure contained in K.S.A. 44-510j.

Award

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated June 5, 2002, is hereby modified as to issue number one but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2002

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeffrey K. Cooper, Attorney for Claimant
 John D. Jurcyk, Attorney for Respondent and Insurance Carrier
 Bryce D. Benedict, Administrative Law Judge
 Director, Division of Workers Compensation